Supreme Court, U.S.
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No. 01-

IN THE

Supreme Court of the United States

ROOSEVELT EZELL,

Petitioner,

v.

DIRECT LABOR, INC., and THE GRAY INSURANCE COMPANY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF LOUISIANA, FIRST CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

WHETHER A WORKER INJURED ON NAVIGABLE WATERS WITHIN ADMIRALTY JURISDICTION IS ENTITLED TO BRING A GENERAL MARITIME LAW NEGLIGENCE ACTION AGAINST HIS EMPLOYER, AS HELD BY THE FIFTH CIRCUIT, OR IS RELEGATED TO HIS STATE WORKERS' COMPENSATION REMEDY, AS HELD BY THE STATE COURT BELOW AND THE ELEVENTH CIRCUIT.

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OPINIONS BELOW

The unpublished opinion and judgment of the Louisiana Court of Appeal, First Circuit, reversing the trial court's judgment for the Plaintiff/Petitioner is set forth in the Appendix at page 8a.

The unpublished opinion and judgment of the Louisiana Court of Appeal, First Circuit, granting rehearing "for the limited purpose of further clarification of the original opinion in this matter," is set forth in the Appendix at page 1a.

The unpublished order of the Supreme Court of Louisiana, denying the Plaintiff/Petitioner's Application for a Writ of Certiorari, is set forth in the Appendix at page 35a.

The judgment and "findings of fact and reasons for judgment," entered by the 32d Judicial District Court, Parish of Terrebonne, State of Louisiana, on July 8, 1999, is set forth in the Appendix at page 18a.

STATEMENT OF JURISDICTION

(i) The judgment sought to be reviewed was rendered by the Louisiana Court of Appeal, First Circuit, on December 22, 2000.

(ii) The judgment of the Louisiana Court of Appeal, First Circuit, granting rehearing for a limited purpose, was rendered on March 6, 2001. The Order of the Louisiana Supreme Court, denying Plaintiff/Petitioner's Application for a Writ of Certiorari, was issued on May 25, 2001.

(iii) An order was issued by Hon. Antonin Scalia, Circuit Justice for the Fifth Circuit, granting Plaintiff/Petitioner's Application for an extension of time to file this Petition for a Writ of Certiorari to and including September 22, 2001, was issued on August 22, 2001.

(iv) This Court has jurisdiction to review the judgment in question pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS

It is provided in the Constitution that "[t]he judicial power shall extend . . . to all Cases of admiralty and maritime jurisdiction." U.S. Const. art. III, § 2.

It is provided:

> The district courts shall have original jurisdiction, exclusive of the courts of the States, of:
>
> > (1) Any case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.

28 U.S.C. § 1333(1).

The following section of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901 *et seq.*, is not directly relevant to the case at this point, but is cited pursuant to Sup. Ct. R. 14(f), as a statute involved in the case at an earlier stage:

> In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed to provide shipbuilding, repairing, or breaking services and such person's employer was the owner, owner pro hac vice, agent, operator, or charterer of the vessel, no such action shall be permitted, in whole or in part or directly or indirectly, against the injured person's employer (in any capacity, including as the vessel's owner, owner pro hac vice, agent, operator, or charterer) or against the employees of the employer. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter.

33 U.S.C. § 905(b).

STATEMENT OF THE CASE

(i) SPECIFICATION REGARDING RAISING OF FEDERAL QUESTION

Since this case involves injury to a plaintiff occurring on the navigable waters of the United States, federal questions regarding application of federal maritime law were raised at all stages of the litigation from filing of the action in the state trial court. The Petitioner initially proceeded under § 905(b) of the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. § 905(b), and judgment was rendered in its favor. The trial court based its decision on the holding in *Randall v. Chevron U.S.A., Inc.*, 13 F.3d 888 (5th Cir.), *reh'g denied, opinion modified on other grounds*, 22 F.3d 568 (5th Cir.), *cert. denied*, 513 U.S. 994 (1994), that "in this circuit, workers injured while transiently or fortuitously upon actual navigable waters are covered by the LHWCA." 13 F.3d at 898.

Subsequent to the trial court's ruling, but prior to the rendition of its judgment, the Fifth Circuit (citing en banc) in *Bienvenu v. Texaco, Inc.*, 164 F.3d 901, 909 (5th Cir. 1999), expressly overruled *Randall* on that point. The *Bienvenu* court held that a worker injured in the course of his employment on navigable waters meets the LHWCA "status test only if his presence on the water at the time of injury was neither transient or fortuitous." *Id.* at 908.

While continuing to assert that he was within LHWCA coverage,[1] the Petitioner acknowledged, for purposes of this action, that his claim *may* no longer be viable under the LHWCA in light of *Bienvenu*. He asserted that his damage

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1. The facts pertaining to Petitioner's separate claim for LHWCA benefits are stated *infra*.

award should be maintained under, inter alia, general maritime law. The Court of Appeals rejected that assertion, stating, inter alia, Ezell's employment was not itself peculiarly maritime in nature nor was its purpose to facilitate maritime commerce, in that the work he performed involved working on an inland fixed oilfield platform (citing *Rodrigue v. Aetna Casualty & Surety Co.*, 395 U.S. 352, 355 (1969)), and concluding that "Ezell is limited to available state law remedies." (6a.)

In its opinion granting rehearing "for the limited purpose of further clarification of the original opinion," the Louisiana Court of Appeal, First Circuit, sought to distinguish between admiralty and maritime jurisdiction on the one hand, and the right of the Petitioner to recover under general maritime law on the other. The court held:

> A tort action falls within admiralty or maritime *jurisdiction* if the tort occurred in navigable waters and had a significant relationship to a traditional maritime activity. Maritime jurisdiction would be properly invoked in this matter since the accident giving rise to Ezell's injuries occurred in navigable waters and involves the negligent operation of a vessel on such waters.

(2a (citing *Foremost Ins. Co. v. Richardson*, 457 U.S. 668, 674 (1982) (Court's emphasis).) That court concluded its opinion by holding:

> We thus clarify our original opinion by making clear that Ezell is limited in his recovery to state law remedies based on the "maritime but local" doctrine.

(6a.)

(ii) SEPARATE LHWCA PROCEEDINGS

The Petitioner filed a claim for LHWCA benefits. (Case No. 95-LHC-2763; OWCP No. 07-134621). The Administrative Law Judge, by Order entered January 13, 1998, awarded medical benefits. Both parties appealed to the Benefits Review Board (BRB Nos. 98-0826, 98-0826A, 98-0826B), and the Board, inter alia, remanded the case to the ALJ on the coverage issue, by Decision and Order issued March 8, 1999. In his Decision and Order on Remand, entered December 2, 1999, and filed December 8, 1999, the ALJ found that Mr. Ezell's injury was not covered under the Act. A further appeal was taken to the BRB, however, essential documents have been lost within the Office of Administrative Law Judges, and the BRB has ordered that such documents either be found, or the case be retried. The Petitioner has filed a demand for a new hearing.

(iii) STATEMENT OF MATERIAL FACTS

The Petitioner, Roosevelt Ezell, was hired as a roustabout by Respondent Direct Labor, Inc., in June 1994. Direct Labor was engaged in supplying labor for projects undertaken by Chet Morrison General Contractors, Inc. A few weeks after he began working for Direct Labor, Inc., Mr. Ezell was assigned to work on an inland tank battery platform owned by Mobil Oil Company. In order to reach that worksite, it was necessary to travel by boat over navigable waters. The fleet of boats used to transport Mr. Ezell and his fellow workers from land to the worksite was owned by Chet Morrison General Contractors, but operated by employees of Direct Labor, Inc.

On August 19, 1994, Mr. Ezell was transported by boat from the Bayou Black Marina, over navigable waters, to the fixed platform, which was located in the marshlands of Bayou Penchant. After working a full day, he and other workers on the platform boarded a vessel owned by Morrison and operated by one Roger Pitre, an employee of Direct Labor, Inc., for the voyage back to the Bayou Black Marina.

Mr. Ezell was sitting on a water cooler as the boat traveled on navigable waters. His supervisor, Direct Labor employee Earl Trahan, alerted Mr. Pitre that he was about to enter the wrong canal. Mr. Pitre made a sudden turn, causing Mr. Ezell and other employees to be thrown about in the boat. Mr. Ezell was thrown against the side of the boat, injuring his back.

REASON FOR GRANTING THE WRIT

THE PETITIONER, AS A WORKER INJURED IN AN ACCIDENT CAUSED BY THE NAVIGATIONAL ERROR OF HIS COEMPLOYEE, OCCURRING WHILE HE WAS A PASSENGER IN A VESSEL ON NAVIGABLE WATERS, IS ENTITLED TO SUE HIS EMPLOYER UNDER GENERAL MARITIME LAW, AND IS NOT RELEGATED TO HIS STATE WORKERS' COMPENSATION REMEDIES.

It is respectfully asserted that this case is one which clearly calls for review by this Court pursuant to the standards set out in Sup. Ct. R. 10. The decision of the Louisiana Court of Appeal, First Circuit,[2] and the Eleventh Circuit's holding

2. Because the Louisiana Supreme Court denied the Petitioner's Application for a Writ of Certiorari without any consideration of the merits, this Writ of Certiorari is directed to the state intermediate appellate court. *E.g.*, *Interstate Circuit, Inc. v. City of Dallas*, 390 U.S. 676, 678 n.1 (1968).

in *Brockington v. Certified Electric, Inc.*, 903 F.2d 1523, 1528-33 (11th Cir. 1990), *cert. denied*, 498 U.S. 1026 (1991), on which the state court's decision is based (4a-6a), is in conflict with the holding on the relevant point by the Fifth Circuit in *Green v. Vermilion Corp.*, 144 F.3d 332, 336-42 (5th Cir. 1998), *cert. denied*, 526 U.S. 1017 (1999). Further, the question the Petitioner presents for review is one which goes to the heart of a question which has been of continuing concern to this Court, i.e., that of when and under what circumstances action can be brought under general maritime law for injury or death occurring on navigable waters? The Court has recently addressed such question, albeit in another context, in *Norfolk Shipbuilding & Drydock Corp. v. Garris*, 121 S. Ct. 1927 (2001). This case presents an opportunity for this Court to resolve a conflict on an important point which, if allowed to remain unresolved, will continue to engender confusion among the circuits and the state courts deciding maritime cases pursuant to the Saving to Suitors Clause, 28 U.S.C. § 1333(1).

The Court's attention is initially called to *Green*, which, it is submitted, should be approved by this Court and applied in this case. In *Green*, the plaintiff was employed at a duck camp operated by the defendant. He was injured while assisting another Vermilion employee in tying up a vessel and unloading supplies and equipment. As summarized by the Fifth Circuit, "[w]hile he was mooring the vessel, Green boarded the *M/V Gadwell*, slipped and fell on the deck." 144 F.3d at 334. After holding that the plaintiff was excluded from LHWCA coverage, *id.* at 335, and that the facts of the case provided "a sufficient nexus to maritime authority for us to assert admiralty jurisdiction over [the] case," *id.* at 336, the *Green* court turned to the question here at issue, of whether the plaintiff was entitled to bring action under

general maritime law, or whether he could be deprived of his maritime rights by the exclusive remedy provision of the Louisiana Workers' Compensation Act, La. Rev. Stat. Ann. § 23:1032 (West 1998).

It is noted at this point that there is no question here but that Mr. Ezell's injury was within admiralty jurisdiction. The Louisiana Court of Appeal explicitly recognized that point, holding:

> Maritime jurisdiction would be properly invoked in this matter since the accident giving rise to Ezell's injuries occurred in navigable waters and involves the negligent operation of a vessel on such waters.

(2a (citing *Foremost Ins. Co. v. Richardson*, 457 U.S. 668, 674 (1982)).) As held in *Sosa v. M/V Lago Izabal*, 736 F.2d 1028 (5th Cir. 1984), "[a]dmiralty jurisdiction exists wherever the injuries occur on navigable water in connection with the navigation of a vessel." *Id.* at 1031 (citing, *e.g.*, *Kelly v. Smith*, 485 F.2d 520, 524 (5th Cir. 1973), *cert. denied sub nom., Chicot Land Co. v. Kelly*, 416 U.S. 969 (1974)). As in *Mink v. Genmar Industries, Inc.*, 29 F.3d 1543 (11th Cir. 1994), "the relevant activity [here] is the navigation of a vessel on navigable waters," *id.* at 1546, and as pointed out in *Mink*, "[o]bviously [the navigation of a vessel on navigable waters] is the very paradigm of traditional maritime activity." *Id.* (citing, *cf.*, *Sisson v. Ruby*, 497 U.S. 358, 368 (1990) (Scalia, J., concurring)).[3]

3. The Louisiana state courts have recognized that the duty owed by the owner or operator of a crewboat is the general maritime law duty of reasonable care under the circumstances, imposed by (Cont'd)

Returning to *Green*, the Fifth Circuit reiterated its adherence to its earlier holdings, in *Thibodaux v. Atlantic Richfield Co.*, 580 F.2d 841 (5th Cir. 1978), *cert. denied*, 442 U.S. 909 (1979), and *King v. Universal Electric Co.*, 799 F.2d 1073 (5th Cir. 1986), both of which cases held, in the wrongful death context, that general maritime law actions for the deaths of workers who were neither Jones Act seamen nor covered by the LHWCA could not be precluded by the Louisiana exclusive remedy bar. Specifically, the *Green* court quoted with approval the *Thibodaux* holding that

> relevant Supreme Court and Fifth Circuit precedent made "it clear that an exclusive remedy provision in a state workmen's compensation law cannot be applied when it will conflict with maritime policy and undermine substantive rights afforded by federal maritime law."

144 F.3d at 336 (quoting 580 F.2d at 847). The *Green* court further pointed out that

> [a] later panel of this court strengthened *Thibodaux* by holding that irrespective of whether the defendant in the maritime tort suit is the plaintiff's "statutory employer," like in *Thibodaux*, or his "actual employer," federal maritime law overrides the exclusive remedy provision of the Louisiana Workers' Compensation Act in each case.

144 F.3d at 336 (quoting *King*, 799 F.2d at 1074).

(Cont'd)

Kermarec v. Compagnie Generale Transatlantique, 358 U.S. 625 (1959). *Parker v. Southwestern Offshore Corp.*, 32,606, pp. 3, 6 (La. App. 2d Cir. 12/15/99), 763 So. 2d 638, 641, 643, *writ denied*, 2000-0081 (La. 2/25/00), 755 So. 2d 888.

The *Green* court noted the conflict with *Brockington*,[4] stating:

> The Eleventh Circuit appears to have charted a different course as it barred a plaintiff from asserting a negligence claim under general maritime law where an exclusivity provision of a state workers' compensation scheme applied. *See Brockington v. Certified Elec., Inc.*, 903 F.2d 1523, 1533 (11th Cir.1990), *cert. denied*, 498 U.S. 1026, 111 S.Ct. 676, 112 L.Ed.2d 668 (1991). That circuit distinguishes *Thibodaux* and *King on the grounds that they apply only to wrongful death actions*, a tort for which the Supreme Court expressly recognized admiralty jurisdiction in order to provide national uniformity.

144 F.3d at 336-37 (emphasis added).

The Fifth Circuit pointed out:

> Though *Thibodaux* and *King* involved wrongful death claims, their holdings were based on the Supreme Court's pronouncement that "'[w]hile states may sometimes supplement federal maritime policies, a state may not deprive a person of any substantial admiralty rights as defined in controlling acts of Congress or by interpretive decisions of this Court.'" *Thibodaux*, 580 F.2d at 846 (quoting *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406, 409-10, 74 S.Ct. 202, 205, 98 L.Ed. 143 (1953)).

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4. The *Green* court indicated that such conflict did not apply to the unseaworthiness claim there at issue. 144 F.3d at 337. Unseaworthiness, however, is not at issue here.

Id. at 337 (emphasis added) (the holding of *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406, 409-11 (1953), was that the admiralty rule of comparative negligence, rather than a state contributory negligence rule, applied in a maritime tort action brought by a carpenter injured while working on a ship on navigable waters).

Following discussion of the unseaworthiness issue, the *Green* court turned to the maritime negligence cause of action here at issue and, while recognizing that "[t]here are conflicting lines deciding the force to be given an exclusive remedy provision of a state workers' compensation statute in the maritime context," 144 F.3d at 339 (citing *Davis v. Department of Labor & Industries*, 317 U.S. 249, 253 (1942) (which lists cases taking the conflicting positions)), aptly noted:

> Apparently the court in *Brockington* only unearthed the line of Supreme Court cases giving preclusive effect to state workers' compensation statutes since it failed to cite any of the cases recognizing the superiority of general maritime tort claims over state remedies. *See Brockington*, 903 F.2d at 1532. Since our holding today relies heavily on this more venerable line of Supreme Court precedent which the Eleventh Circuit did not treat, we think the split with our sister circuit which we create today will be short-lived.

Green, 144 F.3d at 339 n.3.

Among the many cases cited by the *Green* court as unequivocally holding that "state workers' compensation statutes can not preclude an employee from asserting a

general maritime negligence claim against his employer for injuries sustained on navigable waters during the course of his employment," *id.* at 339, are the leading cases of *Southern Pacific Co. v. Jensen*, 244 U.S. 205 (1917), and *Spencer Kellogg & Sons, Inc. v. Hicks (The Linseed King)*, 285 U.S. 502 (1932).

Spencer Kellogg is particularly significant. There, Spencer Kellogg transported some of its employees on a daily basis across the Hudson River between New York City and its factory in New Jersey. The vessel used for such transportation sank, causing multiple injuries and deaths among the employees/passengers. The lower courts held, on the employer/vessel owner's limitation of liability petition, that the injured employees, and representatives of the deceased employees, were relegated to their rights under the New Jersey Workmen's Compensation Law. This Court reversed, holding, inter alia:

> Kellogg & Sons undertook the interstate carriage of passengers by water on a launch operated by its servants. This was a maritime matter. The ferriage was for the facilitation of the company's business and for its convenience as well as that of the employees. *The injury to the passengers resulted from the negligence of the company's agents in the navigation of the launch. It was a maritime tort.* The rights and obligations of the parties depended on and arose out of the maritime law. A proceeding to impose liability for such a tort is a cause in admiralty within the meaning of article 3, § 2 of the Constitution.

285 U.S. at 512-13 (emphasis added; footnote omitted).

The Court further pointed out that the employer/vessel owner "sustained toward employees injured or killed the *dual relationship* of a carrier by water and a general employer at its Edgewater plant." *Id.* at 514 (emphasis added). In the former capacity, it could be sued "according to the rules of the maritime law." *Id.*

The *Green* court acknowledged:

> Other cases run directly contrary to the authorities *supra* as they purport to hold that the exclusive remedy provision of a state workers' compensation statute precludes an employee from asserting a general maritime negligence claim against his employer.

144 F.3d at 340. One of those cases, *P.J. Carlin Construction Co. v. Heaney*, 299 U.S. 41 (1936), was heavily relied upon by the Eleventh Circuit in *Brockington*, 903 F.2d at 1532. The *Green* court rejected that reliance, distinguishing

> *Heaney* from the other cases in the *Grant Smith* line and the case at bar on the grounds that in *Heaney* the employee plaintiff did not assert negligence on the part of his employer. *See Heaney*, 299 U.S. at 44, 57 S.Ct. at 76.

144 F.3d at 340 n.4 (referring to *Grant Smith-Porter Ship Co. v. Rohde*, 257 U.S. 469 (1922)).

The *Green* court significantly pointed out that

> Though there is an apparent rift in precedent, the Supreme Court harmonized its cases on the grounds that the state workers' compensation statutes could only apply where the maritime tort

> involved matters of local concern *which had remote or no relation to navigation or maritime commerce.*

144 F.3d at 340 (emphasis added) (citing *John Baizley Iron Works v. Span*, 281 U.S. 222, 230-31 (1930); *Director, Office of Workers' Compensation Programs v. Perini North River Associates*, 459 U.S. 297, 306 (1983)). The case at bar cannot possibly be categorized as having "remote or no relation to navigation or maritime commerce," *Green*, 144 F.3d at 340, inasmuch as Petitioner's injury is alleged to have been caused by negligent navigation of the vessel by a Direct Labor employee, such vessel being one of a fleet of vessels maintained by Direct Labor to transport its employees over navigable water to and from the worksite.

The *Green* court concluded:

> Our review of the Supreme Court's admiralty jurisprudence assures us of the soundness of our earlier holdings in *Thibodaux* and *King*. As we noted *supra*, *Thibodaux*'s holding was driven by the Supreme Court's decision in *Pope which iterated the supremacy of federal admiralty rights over state law mandates where uniformity concerns were present. See Thibodaux*, 580 F.2d at 846. *Contrary to the Eleventh Circuit's view, see Brockington*, 903 F.2d at 1531, *we do not read Thibodaux and King to be limited to wrongful death actions. We see no principled basis for distinguishing between an employee's negligence claim against his employer for wrongful death and an employee's negligence claim against his employer where the injury stops short of a fatality.*

> The key factor is maintaining uniformity in admiralty law and preserving the rights granted to maritime workers, not the degree of harm the worker suffers. An action for negligence has long been a vestige of general maritime law; subjecting it to the ebbs and flows of state legislation would disrupt the essential features of admiralty law. . . . Fidelity to the Supreme Court's and our own precedent requires that we hold that the exclusive remedy provision of the Louisiana Workers' Compensation Act *does not preclude Green from asserting his general maritime negligence claim against Vermilion for the non-fatal injuries he sustained during the course of his employment while upon navigable waters.*

Id. at 341 (emphasis added; citation omitted).

The *Green* court's rejection of the distinction between personal injury and workers' compensation causes of action made by the Eleventh Circuit in *Brockington*, 903 F.2d at 1531, is fully in accord with this Court's recent decision in *Norfolk Shipbuilding*. In *Norfolk Shipbuilding*, the relevant question was "whether the negligent breach of a general maritime duty of care is actionable when it causes death, as it is when it causes injury." 121 S. Ct. at 1929. The Court pointed out that nonfatal injuries caused by, inter alia, breach of the duty to avoid maritime negligence are compensable under general maritime law, *id.* at 1929-30 (citing *Robins Dry Dock & Repair Co. v. Dahl*, 266 U.S. 449 (1925)), and that "death caused by breach of the duty of seaworthiness is also compensable." *Norfolk Shipbuilding*, 121 S. Ct. at 1930 (citing *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 409 (1970)). The *Norfolk Shipbuilding* Court observed:

> The choice-of-law anomaly occasioned by providing a federal remedy for injury but not death is no less strange when the duty is negligence than when it is seaworthiness. Of two victims injured at the same instant in the same location by the same negligence, only one would be covered by federal law, provided only that the other died of his injuries.

121 S. Ct. at 1931. The Court held:

> In sum, a negligent breach of a maritime duty of care being assumed by the posture of this case, no rational basis within the maritime law exists for denying respondent the recovery recognized by *Moragne* for the death of her son.

Id. (footnote omitted). The Court concluded:

> The general maritime law has recognized the tort of negligence for more than a century, and it has been clear since *Moragne* that breaches of a maritime duty are actionable when they cause death, as when they cause injury. Congress's occupation of this field is not yet so extensive as to preclude us from recognizing what is already logically compelled by our precedents.

Id. at 1933. It is submitted that it would be equally "irrational" to hold, as did the *Brockington* court, that a worker situated as is Mr. Ezell would have no general maritime law cause of action because he was merely injured, but that his personal representative would have had such a cause of action had he been killed in the accident caused by the maritime negligence of Direct Labor's employee.

It is significant that *Robins Dry Dock*, cited by the Court in *Norfolk Shipbuilding*, was also among the cases cited by the Fifth Circuit in *Green* as "unequivocally" holding

> that state workers' compensation statutes can not preclude an employee from asserting a general maritime negligence claim against his employer for injuries sustained on navigable waters during the course of his employment.

144 F.3d at 339. That point provides further support for the conclusion that *Green* was correctly decided, that *Green* controls the case at bar on the relevant point, and that this Court should grant certiorari so as to establish the principles stated in *Green* as the law nationally.

The Court's attention is further called to *Chan v. Society Expeditions, Inc.*, 39 F.3d 1398 (9th Cir. 1994), *cert. denied*, 514 U.S. 1004 (1995) (applying federal and Washington law), *appeal after remand*, 123 F.3d 1287 (9th Cir. 1997), *cert. dismissed*, 522 U.S. 1110 (1998), which is in basic accord with *Green* and in basic conflict with *Brockington*, although neither of those cases is cited. In *Chan*, the plaintiff was a shore-based employee of the charterer/operator of a cruise ship who was injured while on a cruise. The *Chan* court held that his status as an employee, and the fact that he had accepted state workers' compensation benefits, did not prevent him from proceeding against the employer under general maritime law. The court held:

> We express no opinion whether he was injured in the scope of his employment, but *the point is irrelevant* on the narrow question in this case. Benny Chan has a federal maritime right to sue

> Society Expeditions and the operators of the vessel as a passenger, visitor, or vacationing employee on the *World Discoverer. Whether or not he is deemed to be an employee for some purposes, he still has a general claim in admiralty for negligence, and adjudication of that claim is governed by federal common law.*

39 F.3d at 1403 (emphasis added; footnotes omitted) (citing, *e.g.*, *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625 (1959)).

It is briefly noted that the fact that Mr. Ezell has proceeded against Direct Labor for LHWCA benefits is irrelevant to the question on which review is sought. The Louisiana Court of Appeal, First Circuit, reached its decision on the premise that the Petitioner, pursuant to *Bienvenu v. Texaco, Inc.*, 164 F.3d 901 (5th Cir. 1999), is not within LHWCA coverage. The Petitioner does not accept that conclusion and, as explained *supra*, his LHWCA claim remains pending in the Department of Labor. Nevertheless, this action is premised on his right to maintain a maritime tort action, which right was denied by the Louisiana Court of Appeal on its assumption that he is outside the coverage of the LHWCA, and its conclusion that he is relegated to his state workers' compensation remedy. It is necessarily that decision which will be before this Court for review if this Writ of Certiorari is granted. The separate question of whether Mr. Ezell is within LHWCA coverage remains before the Department of Labor.

Further, it is clear that the Petitioner's LHWCA claim does not preclude his maintenance of the general maritime law negligence action which is here at issue. *Southwest*

Marine, Inc. v. Gizoni, 502 U.S. 81 (1991). In *Gizoni*, the defendant argued, inter alia, that "an employee's receipt of benefits under the LHWCA should preclude subsequent litigation under the Jones Act." *Id.* at 91. The *Gizoni* Court rejected that assertion, holding:

> It is by now "universally accepted" that an employee who receives voluntary payments under the LHWCA without a formal award is not barred from subsequently seeking relief under the Jones Act.

Id. (citing, *e.g.*, Grant Gilmore & Charles L. Black Jr., *The Law of Admiralty* § 6-52 at 435 (2d ed. 1975)). The *Gizoni* Court observed that "[t]his is so, quite obviously, because the question of coverage has never actually been litigated." 502 U.S. at 91. The principle stated and applied in *Gizoni* would necessarily be equally applicable to litigation of a maritime negligence claim, and it would seem to be even more obvious that a worker who has merely filed an LHWCA claim, and received only medical benefits, cannot be precluded from maintaining a maritime negligence claim.

This Court has observed, albeit as dictum, that injured workers who fall under neither the Jones Act nor the LHWCA

> may still recover under an applicable state workers' compensation scheme *or, in admiralty, under general maritime tort principles*[.]

Chandris, Inc. v. Latsis, 515 U.S. 347, 356 (1995) (emphasis added). It is clear that the Louisiana Court of Appeal's decision, which is the subject of this Petition, is contrary to that principle.

CONCLUSION

WHEREFORE, the Petitioner respectfully requests that a Writ of Certiorari issue to the Louisiana Court of Appeal, First Circuit, and that, after full briefing and argument, this Court reverse the judgment of the Louisiana Court of Appeal, First Circuit, and remand the case to that court with instructions that judgment be entered consistent with the principle that the Petitioner is entitled to maintain a negligence action under general maritime law.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE COURT OF APPEAL FOR THE FIRST CIRCUIT, STATE OF LOUISIANA DATED MARCH 6, 2001

STATE OF LOUISIANA
COURT OF APPEAL
FIRST CIRCUIT

NUMBER 99 CA 2645

ROOSEVELT EZELL

VERSUS

DIRECT LABOR, INC.
ABC INSURANCE COMPANY

Judgment Rendered: MAR 6 2001

Opinion Granting Rehearing for Limited Purpose

Appealed from the
Thirty-Second Judicial District Court
In and for the Parish of Terrebonne
State of Louisiana
Docket Number 113,010

Honorable John T. Pettigrew, Judge

* * *

BEFORE: PARRO, GUIDRY, AND SIMON, JJ.[1]

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1. Judge Anne L. Simon, of the Sixteenth Judicial District court, is serving as judge *pro tempore* by special appointment of the Louisiana Supreme Court.

Appendix A

GUIDRY, J., on rehearing.

We grant a rehearing for the limited purpose of providing more in-depth reasoning to clarify our original opinion. Specifically, we will discuss in detail the applicability of the "maritime but local" doctrine to the case before us.

In his application for rehearing, the appellee, Roosevelt Ezell, contends that this court erred in failing to maintain the judgment of the trial court under general maritime law. Ezell does not contest the observation by this court that his work duties bear little or no relationship to traditional maritime activities and therefore are not peculiarly maritime in nature. Rather, he argues that this court should have looked at the nature of the tort itself in determining whether general maritime law should apply.

In order to determine whether a tort falls within the ambit of admiralty or maritime *jurisdiction*, the court should look to the nature of the activity giving rise to the tort injury. A tort action falls within admiralty or maritime *jurisdiction* if the tort occurred in navigable waters and had a significant relationship to a traditional maritime activity. Maritime jurisdiction would be properly invoked in this matter since the accident giving rise to Ezell's injuries occurred in navigable waters and involves the negligent operation of a vessel on such waters. *See Foremost Insurance Company v. Richardson*, 457 U.S. 668, 674, 102 S.Ct. 2654, 2658, 73 L.Ed.2d 300 (1982).

However, the question before us in deciding this matter is not a determination of *jurisdiction*, but of what law —

state or federal — should apply. As previously stated, based on the nature of the accident giving rise to Ezell's injury, maritime jurisdiction clearly lies. Yet the invocation of maritime jurisdiction does not, in turn, mandate the application of general maritime law.

In *Director, Office of Workers' Compensation Programs, U.S. Department of Labor v. Perini North River Associates*, 459 U.S. 297, 306, 103 S.Ct. 634, 641, 74 L.Ed.2d 465 (1983), the United States Supreme Court stated:

> If the employment of an injured worker was determined to have no "direct relation" to navigation or commerce, and "the operation of local law [would not] materially affect" the uniformity of maritime law, then the employment would be characterized as "maritime but local," and the state could provide a compensation remedy.

In *Milstead v. Diamond M Offshore, Inc.*, 95-2446 (La. 7/2/96), 676 So. 2d 89, the Louisiana Supreme Court further explained that the key consideration in determining whether state laws apply in maritime cases is uniformity. "Nonetheless, this demand for uniformity is not inflexible and does not totally preclude application of state laws. Rather, since [*Southern Pacific Company v.*] *Jensen* [244 U.S. 205, 37 S.Ct. 524, 61 L.Ed. 1086 (1917)], the United States Supreme Court has made clear that the decision whether to apply a state rule must be based upon a balancing of state and federal interests." *Milstead*, 95-2446 at 8, 676 So. 2d at 94. *See also American Dredging Co. v. Miller*,

510 U.S. 443, 451, 114 S.Ct. 981, 987, 127 L.Ed.2d 285 (1994). State law may be applied where the state's interest in a matter is greater than the federal interest. *Green v. Industrial Helicopters, Inc.*, 593 So. 2d 634, 638 (La. 1992), *cert. denied*, 506 U.S. 819, 113 S.Ct. 65, 121 L.Ed.2d 32 (1992). Furthermore, the uniformity interest is said to be "minimal in many tort cases due to the fortuitous nature of accidental injuries and the strong state interest in providing redress for injuries. . . ." *Rodrigue v. LeGros*, 563 So. 2d 248, 254 (La. 1990).

A case directly on point with the facts and issues of the matter before us is *Brockington v. Certified Electric, Inc.*, 903 F.2d 1523 (11 Cir. 1990). In that case, a land-based electrician injured his back while being transported in a boat driven by his co-worker to work on a small island located off the coast of Georgia. The Eleventh Circuit first acknowledged that plaintiff's claim fell under the maritime jurisdiction of the court because the accident occurred in navigable waters and was a "particular hazard of traveling upon the water and clearly within the purview of the traditional role of admiralty law." *Brockington*, 903 F.2d at 1529. However, the court nevertheless determined, on weighing the comparative interests of state and federal law, that state law, rather than general maritime law should govern plaintiff's claims.

The Eleventh Circuit noted that the federal interests to be vindicated in applying general maritime law would be uniformity, protection of statutorily or judicially created federal rights, and the traditional inclination to allow plaintiffs to prevail in personal injury or wrongful-death

maritime tort claims. These interests were found to be insubstantial by the court as applied to this claim. On the other hand, the state's interest in applying its law was found to be "relatively high." *Brockington*, 903 F.2d at 1532. The court then noted the peculiarly local nature of the action as indicated by the occurrence of the accident in state waters and the parties being state residents. Further, the court found that application of state law would not interfere with federal maritime policy due to the absence of federal provisions or rules specifically providing for plaintiff's cause of action. The court also looked to the purpose of the state's workers' compensation scheme to provide a means by which employers and employees could escape entirely from personal injury litigation based on job-related, accidental injuries. After considering these interests and balancing them with the federal interests, the court held that the strong state's interest in applying its workers' compensation law far outweighed the federal interests found.

Ezell contends that general maritime law should apply, based on the case of *Green v. Vermillion Corporation*, 144 F.3d 332 (5th Cir. 1998), a case factually distinguishable from the matter before us. In *Green*, the Fifth Circuit reversed the ruling of the federal district court insofar as it declared that the Louisiana Workers' Compensation Statutes applied to the exclusion of the plaintiff's claims of unseaworthiness and negligence. The court found it was contrary to federal law to deprive a "maritime worker" of his rights under general maritime law. Specifically, the court found plaintiff's employment to be maritime in nature (the loading and unloading of a vessel which is a traditional maritime activity), thereby entitling him to the remedies afforded under general

maritime law. In the case before us, it is clear that Ezell's employment was not maritime in nature. Therefore, the basis for not applying state law remedies in *Green* is not present in this case.

In Ezell's case, the state and federal interests involved parallel those enumerated in *Brockington*. Therefore, we find that application of state law is warranted under the facts of this case. *See also Zeller v. Olympic Marine Company*, 96-771, p. 8 (La. App. 5th Cir. 3/12/97), 692 So. 2d 1172, 1175, *writ denied sub nom. Zeller v. Fling*, 97-0957 (La. 5/16/97), 693 So. 2d 802. We thus clarify our original opinion by making clear that Ezell is limited in his recovery to state law remedies based on the "maritime but local" doctrine.

REHEARING GRANTED WITHOUT ORAL ARGUMENT FOR THE LIMITED PURPOSE OF FURTHER CLARIFICATION OF THE ORIGINAL OPINION IN THIS MATTER.

Appendix A

COURT OF APPEALS, FIRST CIRCUIT
STATE OF LOUISIANA

RE: Docket Number 1999/CA/2645

ROOSEVELT EZELL

— Versus —

DIRECT LABOR, INC., CHET MORRISON GENERAL CONTRACTORS, INC., AND THE GRAY INSURANCE COMPANY

32nd Judicial District Court
Case #: 113010
Terrebonne Parish

On Application for Rehearing.

Rehearing granted for limited purpose

s/ Randolph H. Parro
Randolph H. Parro

s/ John M. Guidry
John M. Guidry

s/ Anne Lennan Simon
Anne Lennan Simon

Filed MAR 6 2001

s/ Christine L. Crow
Christine L. Crow, Clerk

APPENDIX B — OPINION OF THE COURT OF APPEAL FOR THE FIRST CIRCUIT, STATE OF LOUISIANA DATED DECEMBER 22, 2000

STATE OF LOUISIANA
COURT OF APPEAL
FIRST CIRCUIT

NUMBER 99 CA 2645

ROOSEVELT EZELL

VERSUS

DIRECT LABOR, INC.
ABC INSURANCE COMPANY

Judgment Rendered: DEC 22 2000

Appealed from the
Thirty-Second Judicial District Court
In and for the Parish of Terrebonne
State of Louisiana
Docket Number 113,010

Honorable John T. Pettigrew, Judge

* * *

BEFORE: PARRO, GUIDRY, AND SIMON, JJ.[1]

---

1. Judge Anne L. Simon, of the Sixteenth Judicial District court, is serving as judge *pro tempore* by special appointment of the Louisiana Supreme Court.

Appendix B

GUIDRY, J.

The employer in an action under the Longshore and Harbor Workers' Compensation Act (LHWCA) appeals the judgment of the trial court awarding injured employee damages. We reverse.

FACTS AND PROCEDURAL HISTORY

In June 1994, Roosevelt Ezell was hired as a roustabout with Direct Labor, Inc. (Direct), a company that supplied workers for jobs secured by Chet Morrison General Contractors, Inc. (Chet). Ezell's initial job duties consisted of stacking pallets, cutting grass, emptying trash, cleaning the breakroom, moving pipes, telephone poles and large toolboxes, grading the yard using a bulldozer, picking up unearthed debris in and around the yard, and cleaning barges.

A few weeks after Ezell began working for Direct, he was given an assignment to work on an inland fixed oilfield platform owned by Mobil Oil Company. In order to work this assignment, Ezell and other Direct employees assigned to the same job were transported by boat to the jobsite. The boats used to transport Ezell and the other employees were owned by Chet. The workers traveled from the Bayou Black Marina through several intracoastal canals to the platform located in the marshlands of Bayou Penchant. The boat ride, one way, took approximately thirty to forty-five minutes. Ezell's job duties on the platform consisted of threading pipe, changing valves, and adding new boards to the deck.

On August 10, 1994, while returning to the Bayou Black Marina at the end of the workday, Ezell was injured when

the boat he was riding in made a sudden left turn. The boat in which Ezell was riding was 19 feet long, with an outboard motor; it was equipped with only two seats. At the time of the accident, two folding chairs, a cylindrical water cooler, and various equipment used by the workers were also in the boat. Ezell's co-worker, Roger Pitre, was driving the boat and was about to enter the wrong canal to return to the Bayou Black Marina, Upon being alerted to this fact by Ezell's supervisor, Earl Trahan, Pitre made a sudden turn, causing Ezell and the other employees to be thrown about in the boat. As a consequence of the sudden turning of the boat, Ezell was thrown against the side of the boat and injured his back. Upon arriving at the marina, Ezell was carried from the boat and transported by helicopter to the Terrebonne General Medical Center.

There were five passengers in the boat at the time Ezell was injured: Trahan, Pitre, Earl Ballard, Donald Brown and Ezell. At the time of the accident, Ezell was seated on a water cooler, Ballard and Brown were seated in the two folding chairs, while Pitre and Trahan were seated in the two seats mounted to the boat.

On June 7, 1995, Ezell filed a petition for damages against Direct and ABC Insurance Company. On June 27, 1995, Direct answered the petition, generally denying the allegations of the petition. On June 21, 1996, Ezell filed a supplemental and amending petition in which he added Chet and the Gray Insurance Company as defendants in the suit. Ezell also sought leave of the trial court to proceed in forma pauperis in that pleading, but the request was denied by the trial court. An answer to this amended petition was filed by

all defendants on July 1, 1996, and an amended answer was filed on October 30, 1997.

On November 2, 4, 5, and 6, 1997, a trial on the merits was held and on June 18, 1998, the record was reopened to receive additional testimony from two witnesses. A judgment was rendered by the trial court on July 8, 1998, with notice being sent to all parties of record on July 14, 1998. In that ruling, judgment was rendered in favor of Ezell against Direct and the Gray Insurance Company. The judgment also dismissed, with prejudice, all claims raised by Ezell against Chet. A motion for suspensive appeal was filed by Direct and the Gray Insurance Company (hereinafter, appellants) on July 21, 1998, and an order granting the same was signed by the trial court on that same date.

ASSIGNMENTS OF ERROR

In contesting the judgment of the trial court, appellants assert the following assignments as error committed by the trial court in the judgment rendered:

1. The trial court erred in finding plaintiff was an employee covered under the Longshore and Harbor Workers Compensation Act.

2. The trial court erred in finding that Direct Labor was the "operator" of the vessel and thus liable to plaintiff under 33 U.S.C. §905(b).

3. The trial court erred in finding any acts of negligence on Direct Labor's part were in the capacity as "owner" not "employer".

4. The trial court erred in not finding plaintiff comparatively at fault.

5. The trial court erred in the amount of damages awarded plaintiff.

DISCUSSION

The United States Constitution grants to federal district courts jurisdiction in all "cases of admiralty and maritime jurisdiction." U.S. Const. art. III, section 2; *Rodrigue v. Legros*, 563 So. 2d 248, 251 (La. 1990). State courts, however, have concurrent jurisdiction by virtue of the "savings to suitors" clause of 28 U.S.C. § 1333(1). Therefore, we, like the trial court, have authority to decide the matter before us.

In their first three assignments of error, appellants basically contend that the trial court erred in finding that Ezell was an employee covered under the LHWCA, 33 U.S.C. § 901 et seq. The trial court found that Ezell was an employee covered under the LHWCA because he was on navigable waters when injured, and based its decision on the U.S. Fifth Circuit Court of Appeals' ruling in *Randall v. Chevron U.S.A., Inc.*, 13 F.3d 888 (5th Cir. 1994), which held that even an employee only transiently or fortuitously on actual navigable waters is covered under the LHWCA. *Randall*, 13 F.3d at 898.

However, prior to the rendition of the trial court's judgment in the case before us, the U.S. Fifth Circuit handed down *Bienvenu v. Texaco, Inc.*, 164 F.3d 901 (5th Cir. 1999).

In that case, the court expressly overruled its prior holding in *Randall* that a worker transiently or fortuitously on navigable waters is covered under the LHWCA. *Bienvenu*, 164 F.3d at 909. In accord with the decisions of the U.S. Supreme Court in *Director v. Perini North River Associates*, 459 U.S. 297, 103 S.Ct. 634, 74 L.Ed.2d (1983) and *Herb's Welding, Inc. v. Gray*, 470 U.S. 414, 105 S.Ct. 1421, 84 L.Ed.2d 406 (1985), the court concluded that "a workman who is aboard a vessel simply transiently or fortuitously, even though technically in the course of his employment, does not enjoy coverage under the LHWCA." *Bienvenu*, 164 F.3d 908.

An appellate court is obligated to adjudge a case before it according to the law existing at the time of its decision. *Segura v. Frank*, 93-1271, pp. 15-16 (La. 1/14/94), 630 So. 2d 714, 725, *cert. denied sub nom. Allstate Insurance Company v. Louisiana Insurance Guaranty Association*, 511 U.S. 1142, 114 S.Ct. 2165, 128 L.Ed.2d 887 (1994). Where the law has changed during the pendency of the suit and retroactive application of the new law is permissible, the new law applies on appeal even though it requires reversal of a trial court judgment that was correct under the law in effect when it was rendered. *Charrier v. Charrier*, 94-921, p. 3 (La. App. 5th Cir. 3/26/96), 672 So. 2d 983, 985, *writ denied*, 96-1561 (La. 9/27/96), 679 So. 2d 1345. In this case, the jurisprudential law had changed *prior* to the trial court rendering its judgment and, therefore, we find that the trial court clearly erred in finding that Ezell was a covered employee under the LHWCA.

Consequently, in light of the *Bienvenu* decision, Ezell acknowledges that his claim may no longer be viable under

the LHWCA. Nevertheless, Ezell asserts that his damage award should be maintained under general maritime law and unseaworthiness.

> The traditional remedies available for employee injuries occurring within admiralty depend upon a person's classification as a seaman, a non-seaman maritime worker, or a nonmaritime worker. Remedies available to "seamen" include wages, maintenance and cure for injury or illness. Recovery includes payment of actual wages, payment for food and lodging, and the providing of necessary medical services. Seamen have claims, too, for personal injury damages caused by the unseaworthy condition of the vessel. The Jones Act also allows a seaman to recover damages for personal injury occurring because of the negligence of the seaman's co-workers or employer. 46 U.S.C. § 688. Shore-based maritime workers may recover workers' compensation from their employers under the Longshore and Harbor Workers Compensation Act (LHWCA). 33 U.S.C.A. §§ 901 et seq. Offshore workers may recover compensation from their employers under the LHWCA by virtue of Section 1333(b) of the outer Continental Shelf Lands Act (OCSLA).

Green v. Industrial Helicopters, Inc., 593 So. 2d 634, 640 (La. 1992), *cert. granted*, 506 U.S. 819, 113 S.Ct. 65, 121 L.Ed.2d 32 (1992).

A tort action falls within admiralty or maritime jurisdiction if the tort occurred in navigable waters (situs)

and had a significant relationship to a traditional maritime activity (status). *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 534, 115 S.Ct. 1043, 1048, 130 L.Ed.2d 1024 (1995); *Fox v. Southern Scrap Export Co., Ltd.*, 618 So. 2d 844, 846 (La. 1993). This two-part determination is usually referred to as the "situs and status" test and, notably, is the same test used to determine whether an employee is covered under the LHWCA. *See Dean v. State*, 542 So. 2d 742, 744 (La. App. 4th Cir.), *writ denied*, 544 So. 2d 410 (La. 1989). There is no dispute as to the navigability of the waterway traversed and hence, the first element of the test is met. However, since the trial court decided the "status" element on the basis of the *Randall* case, we shall determine whether that element is met at this time.[2]

What work has direct relation to navigation or commerce must, of course, be determined in view of surrounding circumstances as cases arise. *Ellis v. Travelers Insurance Company*, 241 La. 433, 129 So. 2d 729, 734 (1961). In *Kelly*

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2. In brief, Ezell refers to the case of *Green v. Vermilion Corporation*, 144 F.3d 332 (5th Cir. 1998), *cert. denied*, 526 U.S. 1017, 119 S.Ct. 1251, 143 L.Ed.2d 349 (1999), as justification for urging this court to affirm his award under general maritime law. Ezell correctly notes that the court in that case found the plaintiff still had a viable claim under general maritime law, although recovery by the plaintiff under the LHWCA was not allowed. That case is clearly distinguishable from the matter before us. A specific exclusion in the LHWCA for employment related to a club or camp barred recovery by the plaintiff in the *Green* case. Yet, as the court pointed out, the plaintiff was able to prove both the elements under the "situs and status" test, which would have otherwise invoked coverage under the act. Ezell has made no such showing.

v. Smith, 485 F.2d 520, 525 (5th Cir. 1973), *cert. denied sub nom. Chicot Land Company, Inc. v. Kelly*, 416 U.S. 969, 94 S.Ct. 1991, 40 L.Ed.2d 558 (1974), the U.S. Fifth Circuit established a four-prong test for determining whether there is a significant relationship to traditional maritime activity: (1) the functions and roles of the parties; (2) the types of vehicles and instrumentalities involved; (3) the causation and type of injury; and (4) traditional concepts of the role of admiralty law. With regard to the functions and roles of the parties, "the proper question is whether the actual tasks the worker performs bears [sic] any inherent relationship to maritime activity." *Dean*, 542 So. 2d at 746.

Considering these principles of law, we must now determine if the facts surrounding Ezell's injury form a cognizant claim under general maritime law. The events leading up to Ezell's injury are largely uncontested. Ezell was assigned to work on a stationary platform located in the marshlands of Bayou Penchant, which could only be reached by boat. Ezell suffered an injury to his lower back when the driver of the boat made a sudden turn causing him to be thrown against the side of the boat. Ezell's employment was not itself peculiarly maritime in nature nor was its purpose to facilitate maritime commerce, in that the work he performed involved working on an inland fixed oilfield platform. *See Rodrigue v. Aetna Casualty and Surety Co.*, 395 U.S. 352, 355, 89 S.Ct. 1835, 1837, 23 L.Ed.2d 360 (1969).

We, therefore, conclude that Ezell was not involved in a "maritime activity" at the time of injury and is thereby precluded from asserting his claims under general maritime

law. In cases where a plaintiff's claim has little or no maritime connection, the courts have found the application of state law remedies appropriate. *Zeller v. Olympic Marine Company*, 96-771, p. 8 (La. App. 5th Cir. 3/12/97), 692 So. 2d 1172, 1175 *writ denied sub nom. Zeller v. Fling*, 97-0957 (La. 5/16/97), 693 So. 2d 802. Accordingly, we reverse the judgment of the trial court and find that Ezell is limited to available state law remedies.[3]

CONCLUSION

Based on the ruling in *Bienvenu v. Texaco, Inc.*, 164 F.3d 901, we reverse the judgment of the trial court finding that Ezell was an employee covered under the LHWCA and entitled to damages for his injuries. All costs of this appeal are cast to appellee, Roosevelt Ezell.

REVERSED.

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3. We do not consider Ezell's claim for unseaworthiness for two reasons. First, we note that such an action is properly brought against a vessel owner. In this case, the vessel owner, Chet, was dismissed with prejudice in the trial court's judgment. That determination was not appealed by Ezell and is therefore final. Secondly, we note that Ezell is not of the class of persons entitled to recover under the doctrine. Accordingly, we find that Ezell has proven no right to recovery for the alleged unseaworthiness of the vessel at issue.

APPENDIX C — FINDINGS OF FACT AND REASONS FOR JUDGMENT AND JUDGMENT OF THE 32ND JUDICIAL DISTRICT COURT FOR THE PARISH OF TERREBONNE, STATE OF LOUISIANA DATED AND FILED JULY 8, 1999

32ND JUDICIAL DISTRICT COURT
PARISH OF TERREBONNE
STATE OF LOUISIANA

NO. 113010

ROOSEVELT EZELL

VS.

DIRECT LABOR, INC. and
ABC INSURANCE COMPANY

JUL -8 1999
DATE FILED

s/ Carla O. Ledet
DEPUTY CLERK

FINDINGS OF FACT AND
REASONS FOR JUDGMENT

This matter came before this Court, by virtue of previous fixing for trial on the merits on November 3rd, 4th, 5th, and 6th, 1997, and June 18th, 1998.

* * *

Considering the entire record of this proceeding, the evidence introduced including physical evidence, exhibits, oral testimony, oral argument of the parties, and the memoranda submitted by the parties;

Appendix C

The law and evidence being in favor thereof, the Court renders its following findings of fact and reasons for judgment.

On/or about August 10, 1994, the plaintiff was allegedly injured when the boat he was riding in made a sudden turn and he was thrown to the side and hit his back on the side of the boat. On this day and time the plaintiff was a member of a work/labor crew, assigned to work on a fixed platform in the marsh, near Houma, Louisiana. The work crew were all employees of Direct Labor, Inc. (Direct Labor). Direct Labor is a labor service company that supplied workers to Chet Morrison General Contractors, Inc. (CMC). The plaintiff was in the course and scope of his employment. The boat that the work crew was riding in was owned by CMC. The operator of the boat at the time of the alleged incident was Roger Pitre, an employee of Direct Labor. There were five employees of Direct Labor in the boat, including plaintiff, and the foreman of the crew, Mr. Earl Trahan. Mr. Earl Trahan was seated next to Mr. Pitre in the boat at the time of the accident.

The defendants raise several defenses. Direct Labor urges that the plaintiff is not an employee covered by the Longshoreman/Harbor Workers' Compensation Act (LHWCA), but is a State Workers' Compensation Employee and his exclusive remedy is under the Louisiana Workers' Compensation Act. They also argue that if he is an employee covered under LHWCA, that his employer, Direct Labor, is immune from suit, under 33 U.S.C.A. §904 of the LHWCA. Direct Labor also argues that the plaintiff has previously litigated the nature and extent of his disability and that the

Appendix C

Administrative Law Judge's determinations are binding on plaintiff and this court, citing La. R.S. 13:4231(3), which issues were addressed in the matter entitled "Roosevelt Ezell, Claimant, vs. Direct Labor, Inc., Employer, and the Gray Insurance Company, Carrier," Case No. 95-LHC-2763, OWCP No. 07-134621, of the Office of Administrative Law Judges, U.S. Dept. of Labor.

CMC contends that if plaintiff is an employee covered by LHWCA, his exclusive remedy for personal injury against CMC, as vessel owner, is an action for negligence. CMC argues that they were not liable for any injuries suffered by plaintiff because none of CMC's employees were either operating the boat or in the boat at the time of the accident, and they had completely turned over the vessel or boat to Direct Labor. Further, they argue that if the plaintiff is a borrowed employee of CMC, then Louisiana Workers' Compensation Act would apply, and the plaintiff's sole remedy against CMC would be under Louisiana Workman's Compensation.

At the time of the trial of the merits, the Court took under advisement the motion as to whether issue preclusion under La. R.S. 13:4231(3) applied in this case, as raised by defendants. The Court notes that under La. R.S. 13:4231, which is Louisiana's res judicata statute, the opening paragraph provides, "Except as otherwise provided by law, a valid and final judgment is conclusive between the *same parties* except on appeal or other direct review, to the following extent. . . ." (Emphasis added.) The statute sets forth three different situations, one of them being issue preclusion under subparagraph three. However, for La. R.S.

13:4231(3) to apply, there must be identity of parties in the previously litigated matter. **Morris v. Haas**, 95-75 (La. App. 5 Cir. 5/30/95), 659 So.2d 804, *writ denied*, 95-2519, 95-2545 (La. 12/15/95), 664 So.2d 441.

The previous administrative proceeding referred to by the defendants involved a dispute between Roosevelt Ezell, Direct Labor, and the Gray Insurance Company. This case involves a dispute between Roosevelt Ezell, Direct Labor, the Gray Insurance Company, and CMC. Because there was no identity of parties in the previous administrative hearing, the Court finds that La. R.S. 13:4231(3) does not apply in this case. Therefore, the Court will deny the motion for issue preclusion filed by the defendants.

The key issue in this case is whether the plaintiff was an employee of Direct Labor or was a borrowed employee of CMC. There are similar tests for borrowed employee status under both the Louisiana Workers' Compensation Act and the LHWCA. These various factors include the right of control; selection of employees; payment of wages; power of dismissal; relinquishment of control by the general employer; which employer's work was being performed at the time in question; agreement, either implicit or explicit between the borrowing and lending employer; furnishing of necessary instruments and the place for performance of the work in question; length of time in employment; and acquiescence by the employee in the new work situation. *See* **Walters v. Metropolitan Erection Company**, 94-0162, 94-2175 (La. App. 4 Cir. 10/27/94), 644 So.2d 1143, *writ denied*, 94-2858, 94-2870 (La. 2/9/95), 649 So.2d 420; **Conner v. American Marine Corporation**, 96-2175 (La. App. 4 Cir. 11/27/96),684 So.2d 550.

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There is no question that there was a commonality between Direct Labor and CMC insofar as ownership and management of the two companies. However, both were separate legal entities. After review of all the factual testimony and exhibits introduced in this case, the Court notes that at the time the Direct Labor employees went out to perform the work, there were no CMC employees supervising them. They were given free reign to do the work in the manner in which they (Direct Labor) felt it should be done. The plaintiff was paid by Direct Labor. He received his instructions from Direct Labor and could be hired and fired by Direct Labor. He had been initially employed by Direct Labor. Direct Labor had a contract with CMC to provide laborers, but it was Direct Labor that directed its employees on how to do the job. The Court finds as a finding of fact that the plaintiff was not a borrowed employee of CMC, but was in fact an employee of Direct Labor at the time of this accident.

Next, the Court must decide if the plaintiff has coverage under the LHWCA. In part, 33 U.S.C.A. §903(a) provides that if the disability or death results in an injury occurring on the navigable waters of the United States (including any adjourning pier, wharf, dry-dock, terminal building way, marine railway, or other adjourning area customarily used by an employee in loading, unloading, repairing, dismantling, or building a vessel), compensation shall be payable upon the disability or death of an employee. Under 33 U.S.C.A. §902(3), the term "employee" is defined, in part, as "any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor worker including a ship repairman, shipbuilder, and ship-breaker."

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Whether the plaintiff's accident is covered by the LHWCA depends upon whether he satisfies a two-prong test. First, his injury must have occurred at a covered location or situs. Second, he must satisfy the status test, i.e., he must be a person engaged in maritime employment. *See* **Herb's Welding, Inc. v. Gray**, 470 U.S. 414, 105 S.Ct. 1421, 84 L.Ed.2d 406 (1985). The fact testimony in this case showed that part of the plaintiff's duties was to offload and load vessels that were used in the transportation of equipment to offshore and inshore construction sites. He had been hired as a rigger with certain limitations due to his not being able to operate heavy construction machinery because of his eyesight. Further, in the face of **Randall v. Chevron U.S.A., Inc.**, 13 F.3d 888 (5th Cir. 1994), *cert. dismissed*, 512 U.S. 1265, 115 S.Ct. 5, 129 L.Ed.2d 906 (1994), it has been held that a worker injured transiently or fortuitously on actual navigable waters was subject to LHWCA coverage.

In this case at hand, the boat in question is a 19 foot boat, documented and registered with the Louisiana Wildlife and Fisheries Department, approximately 6 feet wide, with an outboard motor. At the time of the accident, the route to and from CMC's work yard to the work site required an approximately 45-minute ride in this boat over bodies of water such as Bayou Cocodrie, Bayou Penchant, the Intracoastal Canal, and other bodies of water, which have traditionally and historically been navigable and have been utilized for years by the marine industry to transport supplies, materials, and workers to and from job sites offshore and inshore. The Court finds as a finding of fact that this accident occurred over navigable waters. The Court also finds that the boat being utilized was a vessel. The Court finds that the

plaintiff meets both the situs and status tests for coverage under the LHWCA. Therefore, the Court finds that the LHWCA applies to the fact circumstances of this case and to the plaintiff. Normally, the exclusive remedy of the employee would be the benefits provided by said act, unless it meets a recognized exception. Pursuant to 33 U.S.C.A. §905(b), there is an exception to the exclusive remedy under the LHWCA, allowing the injured person a cause of action for the negligence of a vessel, The term "vessel" in this context includes the vessel's owner, owner pro hac vice, agent, *operator*, charter or bare boat charterer, master, officer, or crew member. 33 U.S.C.A. §902(21). Thus, when an employer acts in a dual capacity as vessel owner, the entity retains its immunity for acts taken in its capacity as an employer, but may still be sued "qua vessel" for acts of vessel negligence. **Levene v. Pintail Enterprises, Inc.**, 943 F.2d 528 (5th Cir. 1991), *cert. denied*, 504 U.S. 940, 112 S.Ct. 2274, 119 L.Ed.2d 201 (1992).

The fact situation of this case is that a CMC employee directed the foreman of Direct Labor as to which boat to utilize. However, there were other vessels available if the foreman felt the vessel was insufficient. There were no CMC employees in the boat in its transportation to the work site. The operator of the boat or vessel was an employee of Direct Labor. The boat was 19 feet in length. Five working men were placed in the boat for transportation. The various tools needed for the job that day were placed in the boat. There were only seats for two individuals. The other individuals either had to sit on the back of the transom, on the floor, or as in the plaintiff's case, on a water cooler, during the transportation trip to and from the work site. The Court finds

as a finding of fact that the operator of the boat, suddenly and without warning, because he had missed a canal, made a sudden turn at a high rate of speed, causing everyone in the vessel to be thrown about with such force that the back of the chair plaintiff was holding onto was ripped out of its bolts. The Court finds that the operator was negligent in the operation of the vessel and that the vessel was overloaded and not suited for its intended purpose. Further, the Court finds there were not sufficient seats provided for all the passengers. All of these acts were vessel negligence and a cause of the accident that occurred and any injuries or damages sustained by the plaintiff.

Direct Labor attempts to limit its liability, saying that since it is plaintiff's employer, they can only be liable and deemed a vessel in one of three ways: (1) as a vessel owner, (2) as a bare boat charterer of the vessel; and (3) as owner pro hac vice of the vessel, of which Direct Labor does not fit under any. However, this argument ignores the plain language of 33 U.S.C.A. §905(b) and §902(21). Direct Labor's employee was the operator. Therefore, Direct Labor was the operator and is liable for any damages sustained by the plaintiff under 33 U.S.C.A. §905(b). The Court finds as a finding of fact there was no comparative fault on the part of the plaintiff.

Next, the Court will discuss the liability, if any, of CMC. Under 33 U.S.C.A. §905(b), plaintiff also has a cause of action against the vessel owner under certain circumstances. It was CMC that instructed Direct Labor's foreman to use the boat in this case. The boat had not been inspected by CMC. CMC was fully aware that the boat only had two seats.

CMC was fully aware that there were five laborers who were going to be transported in the boat. They were also aware of the materials and supplies that were loaded in the boat. It was further testified to by Mr. Trahan, the foreman of Direct Labor, that there were other boats available. Mr. Trahan also testified that even though the boat only had two seats, he did not fully realize at the time the danger to the other passengers.

Did CMC breach a duty owed to the plaintiff? This has been addressed by the United States Supreme Court in the scope of the vessel owner's duty to a longshoreman in **Scindia Steam Navigation Co., Ltd. v. De Los Santos**, 451 U.S. 156, 101 S.Ct. 1614, 68 L.Ed.2d 1 (1981). A ship owner must exercise care to make safe the portions of a ship that it turns over to the stevedore. In discharging this duty, the ship owner may rely on the stevedore's performing its task with reasonable care. The ship owner must also warn the stevedore of hidden unsafe conditions on the ship, of which the ship owner is or should be aware. Once the stevedore begins its operations, the ship owner has no general duty to supervise work or to inspect the area assigned to the stevedore, unless custom, contract, or law imposes such a duty on the ship owner. The ship owner need not monitor the stevedore's operations; rather, the ship owner is entitled to rely on the stevedore's expertise and reasonableness. The Supreme Court made an exception to the general absence of the duty of the ship owner to protect employees of the stevedore during cargo operations. This duty arises when two conditions are fulfilled. If the ship owner becomes aware during the stevedore's work that the ship or its gear poses a danger to the longshoreman and if the ship owner also learns the stevedore is acting unreasonably in failing to protect the

longshoreman against the danger, then the ship owner acquires a duty to intervene and protect the longshoreman. The ship owner can have knowledge of a defect if a defect develops during the stevedore's operation and the ship owner had no actual knowledge, or if the defect existed at the outset and the ship owner "must be deemed" to have knowledge of it.

It also has been held that when the danger was an open and obvious transitory condition created by the stevedore or contractor, the duty to intervene does not exist. **Barbier v. L&M Bo-Truc Rental, Inc.**, 97-1743 (La. App. 4 Cir. 3/4/98), 708 So.2d 519. CMC did not supervise the loading of the vessel in this case. CMC did direct Mr. Trahan, the foreman for Direct Labor, to use a particular vessel, but the vessel defect — having only two seats, rather than the five for all passengers — was open and obvious. The foreman for Direct Labor testified that there were other vessels available, but he never requested any other vessel. Since the vessel's defect was open and obvious, the Court feels that CMC fulfilled its turnover duty, and therefore, there is no liability on them as vessel owner under 33 U.S.C.A. §905(b). The decision of which vessel to use was made by the foreman of Direct Labor.

Prior to the accident in question, the plaintiff had a preexisting degenerative disc condition, that was asymptomatic and problems with his knee. Plaintiff also had a loss of eyesight due to glaucoma and had to work with certain restrictions, such as not operating heavy equipment. On the day of the accident, the plaintiff was thrown violently across the boat and hit his back along the side of the boat.

Once they returned to the dock, he remained seated until they removed him from the boat. Subsequent to the accident, he was immediately seen at Terrebonne General Hospital and then by Dr. Del Walker, whom the defendants contend is the treating physician of the plaintiff. However, the facts really indicate that Dr. Walker was a company doctor regularly utilized by the defendant. Thus, this Court does not consider Dr. Walker the treating physician for the plaintiff. It was the defendants who referred the plaintiff to Dr. Walker. Ultimately, the plaintiff was seen by several other doctors, including Dr. McKowen, Dr. Kinnard, and Dr. Kenneth Vogel. After review of all the medical testimony and diagnostic tests, the Court finds that prior to the accident, the plaintiff had a preexisting degenerative disc problem at the L4-5 level and L5-S1 level. Due to the accident, this condition was aggravated, became symptomatic, and caused an additional injury of a herniated disc at the L5-S1 level. The Court finds that prior to the accident, the plaintiff was able and capable of doing heavy manual labor. Subsequent to the accident and due to the injuries mentioned above, he can now only do light duty manual labor and does not have any transferable skills due to his lack of education and other medical conditions previously mentioned. At the time of the trial, the plaintiff's work life expectancy was 13.65 years.

After review of all the medical testimony, the Court finds that the plaintiff has failed to prove by a preponderance of the evidence, that it is more likely than not that he will need surgery. Therefore, we are dealing with a nonoperated back. For past, present and future physical pain and suffering, mental anguish and disability, the Court shall award the plaintiff $90,000.00, together with legal interest from date

of judicial demand on one-half of same, and legal interest from date of judgment on one-half of same.

The Court does find there will be future medical expenses incurred by the plaintiff, including physical therapy, for the continued problems and pain and suffering he will have with his back. The Court shall award future medical expenses in the amount of $12,000.00 to the plaintiff, together with legal interest from date of judgment until paid.

With regard to lost past wages, there was a great deal of dispute as to whether the plaintiff was able to do light duty work. There was evidence that CMC offered and had available a light duty program. However, the evidence also showed that CMC did not actually supervise the actual type of light-duty work that the plaintiff was doing. The plaintiff continued to complain because he was still being required to do medium-to-heavy duty work in the yard. This was verified by a neutral witness who actually saw the type of work plaintiff was doing. In fact, the last certificate that plaintiff was issued by Dr. Walker indicated that he was totally disabled at that time, and should not have been required to do light duty work. Ultimately, because of his pain, the plaintiff walked off the job. However, the Court finds that subsequent to leaving the employment of CMC, the plaintiff did not seek other employment once he reached maximum medical cure, which the Court sets at February 13, 1996. Because the plaintiff did not actually seek employment, the Court finds that the plaintiff did not mitigate his losses, thus affecting the amount of past lost wages he would have earned. The Court finds that the past lost wages that the plaintiff sustained from the date of the accident to

the trial date was $27,450.00, together with legal interest from date of judicial demand until paid.

Prior to the accident in this case, the plaintiff was capable of and demonstrated the ability to perform heavy manual labor. The plaintiff was of low intelligence and had other medical problems unrelated to this accident, such as a prior knee injury and loss of sight because of glaucoma. The Court finds that he does not have any transferable skills at this time because of the back injury; however, he is able to do light duty work. The Court finds that the plaintiff has sustained $85,000.00 in future lost earnings and earnings capacity, together with legal interest from date of judgment until paid.

There was no evidence introduced as to past medical expenses. Therefore, the Court shall award none for same.

All court costs shall be borne by the defendants cast for Judgment, and court costs shall be set in the judgment by the Court.

These Findings of Fact and Reasons for Judgment were

RENDERED this 7th day of July, 1999, at Houma, Louisiana.

s/ John T. Pettigrew
JOHN T. PETTIGREW
JUDGE

Appendix C

32ND JUDICIAL DISTRICT COURT
PARISH OF TERREBONNE
STATE OF LOUISIANA

NO. 113010

ROOSEVELT EZELL

VS.

DIRECT LABOR, INC. and
ABC INSURANCE COMPANY

JUL -8 1999
DATE FILED

s/ Carla O. Ledet
DEPUTY CLERK

JUDGMENT

This matter came before this Court, by virtue of previous fixing, for merits on November 3rd, 4th, 5th, and 6th, 1997, and June 18th, 1998.

* * *

Considering the entire record of this proceeding, the evidence introduced including physical evidence, exhibits, oral testimony, oral argument of the parties, memoranda submitted by the parties, and the Findings of Fact and Reasons for Judgment rendered this 7th day of July, 1999;

The law and evidence being in favor thereof,

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IT IS ORDERED, ADJUDGED AND DECREED that there be Judgment in favor of the plaintiff, Roosevelt Ezell, and against the defendants Direct Labor, Inc. and the Gray Insurance Company, Inc., individually and in solido, for past, present and future physical pain and suffering, mental anguish and disability in the amount of NINETY THOUSAND AND NO/100 ($90,000.00) DOLLARS, together with legal interest from date of judicial demand on one-half of same, and legal interest from date of Judgment on one-half of same.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there be Judgment in favor of the plaintiff, Roosevelt Ezell, and against the defendants Direct Labor, Inc. and the Gray Insurance Company, Inc., individually and in solido, for future medical expenses in the amount of TWELVE THOUSAND AND NO/100 ($12,000.00) DOLLARS, together with legal interest from date of Judgment until paid.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there be Judgment in favor of the plaintiff, Roosevelt Ezell, and against the defendants Direct Labor, Inc. and the Gray Insurance Company, Inc. for past lost wages in the amount of TWENTY-SEVEN THOUSAND FOUR HUNDRED FIFTY AND NO/100 ($27,450.00) DOLLARS, together with legal interest from date of judicial demand until paid.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there be Judgment in favor of the plaintiff, Roosevelt Ezell, and against the defendants Direct Labor,

Inc. and the Gray Insurance Company, Inc. for future lost earnings and earnings capacity in the full sum of EIGHTY-FIVE THOUSAND AND NO/100 ($85,000.00) DOLLARS, together with legal interest from date of judgment until paid.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there be Judgment in favor of the plaintiff, Roosevelt Ezell, and against the defendants Direct Labor, Inc. and the Gray Insurance Company, Inc. for all court costs of this proceeding including, but not limited thereto to, the following:

1. Dr. George A. Murphy, Expert, Orthopedic Surgery	$1500.00
2. Dr. Lander Pearce, Expert, Radiology	1500.00
3. Dr. William Kinnard, Expert, Orthopedic Surgery	950.00
4. Dr. David Fakier, Expert, Radiology	950.00
5. Randolph Rice, Expert, Economics	1500.00
6. Nathaniel Edward Ventress, Expert, Vocation Rehabilitation	1500.00

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7. Todd Harris,
   Expert, Physical Therapy 1000.00

8. Dr. K.E. Vogel,
   Neurosurgeon, by deposition 600.00

together with legal interest from date of judicial demand until paid.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there be Judgment in favor of the defendant Chet Morrison General Contractors, Inc. and against the plaintiff, Roosevelt Ezell, dismissing the plaintiff's claim with prejudice.

READ, RENDERED AND SIGNED this 7th day of July, 1999, at Houma, Louisiana.

s/ John T. Pettigrew
JOHN T. PETTIGREW
JUDGE

APPENDIX D — ORDER OF THE SUPREME COURT OF THE STATE OF LOUISIANA DENYING APPLICATION FOR WRIT OF CERTIORARI AND/OR REVIEW DATED MAY 25, 2001

THE SUPREME COURT OF THE STATE OF LOUISIANA

NO. 2001-C-0958

ROOSEVELT EZELL

VS.

DIRECT LABOR, INC.
ABC INSURANCE COMPANY

IN RE: Ezell, Roosevelt; – Plaintiff; Applying for Writ of Certiorari and/or Review, Parish of Terrebonne, 32nd Judicial District Court Div. E, Nos. 113010; to the Court of Appeal, First Circuit, No. 99 CA 2645

May 25, 2001

Denied.

JPV
PFC
CDK
CDT
JTK
PCC
RLL

Appendix D

Supreme Court of Louisiana
May 25, 2001

s/ Katherine A. Fontana
Deputy Clerk of Court
For the Court

FILED

OCT 28 200

CLERK

No. 01-525

IN THE

Supreme Court of the United States

ROOSEVELT EZELL,

Petitioner,

v.

DIRECT LABOR, INC. AND THE GRAY INSURANCE COMPANY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF LOUISIANA, FIRST CIRCUIT

RESPONSDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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20 pp

STATEMENT OF PARTIES IN INTEREST

The undersigned counsel of record for Direct Labor, Inc. and The Gray Insurance Company, Respondents, certify the following have an interest in the outcome of this case:

1. Direct Labor, Inc. (Respondent)

2. The Gray Insurance Company (Respondent)

3. Robert S. Reich
   Reich, Meeks & Treadaway, L.L.C.
   3850 North Causeway Boulevard
   Suite 1000
   Metairie, Louisiana 70002
   (Attorney for Respondents)

4. Lawrence R. Plunkett, Jr.
   Reich, Meeks & Treadaway, L.L.C.
   3850 North Causeway Boulevard
   Suite 1000
   Metairie, Louisiana 70002
   (Attorney for Respondents)

5. Roosevelt Ezell (Petitioner)

6. H. Edward Sherman
   The Law Offices of H. Edwards Sherman
   1010 Common Street
   Suite 1750
   New Orleans, Louisiana 70112
   (Attorney for Petitioner)

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents, Direct Labor, Inc. and The Gray Insurance Company (referred to collectively hereinafter as "Direct Labor") respectfully oppose the Petition of Roosevelt Ezell for Writ of Certiorari. Petitioner has failed to meet the established considerations governing review on certiorari and has not set forth compelling reasons for this Court to grant the Petition. Specifically, (a) there is no important federal question which was decided in the courts below and which conflicts with decisions of another state court of last resort or of the United States Court of Appeals; and (b) the decision from the court below did not address an important question of law that has not been settled by this Court.

COUNTERSTATEMENT OF FACTS AND PROCEEDINGS BELOW

Petitioner was hired by Direct Labor as a rigger in June, 1994, and worked exclusively in Direct Labor's Houma, Louisiana yard in a position that was unquestionably not maritime related. In August 1994, Petitioner was temporarily assigned to work with a labor crew on a fixed platform in the marsh hear Houma, Louisiana. In order to access the platform, the work crew used a small boat owned by Chet Morrison General Contractors, Inc. (hereinafter referred to as "CMGC"). CMGC instructed Direct Labor's foreman which of CMGC's available vessels to use to transport the Direct Labor crew to the job site. Petitioner's only connection to this vessel was the use of the vessel in a transportation function to and from the job site.

On August 10, 1994, the Direct Labor crew was riding in CMGC's vessel, returning from a job site, when Earl Trahan, the Direct Labor foreman, realized Roger Pitre, also a Direct Labor employee, was about to turn the vessel down a wrong canal. When Trahan advised Pitre of his error, Pitre slowed the boat down and turned the boat down the proper canal. During the turn, Petitioner fell off the water cooler he was sitting on, striking his back on the side of the boat.

As a result of this incident Petitioner filed suit in the 32nd Judicial District Court, Parish of Terrebonne, State of Louisiana against Direct Labor and CMGC, alleging he was entitled to recover under §905(b) of the Longshore & Harbor Workers' Compensation Act (hereinafter "LHWCA"), 33

U.S.C. §905(b). This matter was tried to the District Judge without a jury on November 3, 4, 5, and 6, 1997 and June 18, 1999. It was taken under submission following the completion of trial and on July 7, 1999 the District Judge issued Findings of Facts and Reasons for Judgment, as well as a separate judgment. Appendix "C", beginning at p. 18a.[1] The trial court found that under *Randall v. Chevron U.S.A., Inc.*, 13 F.3d 888 (5th Cir. 1994), *cert. dismissed*, 512 U.S. 1265, 115 S.Ct. 5, 129 L. Ed. 2d 906 (1994), plaintiff was an employee covered under the LHWCA; that Direct Labor was the operator of the vessel in question, that Direct Labor's employee was negligent in operating the vessel; that CMGC should be exonerated from liability;[2] and that plaintiff was not comparatively at fault. The trial court awarded general damages for past, present, future physical pain and suffering, mental anguish and disability, future medical expenses, past lost wages, future lost earnings and earning capacity, and judicial interest and other costs.

Direct Labor and Gray timely filed a Suspensive Appeal and this matter was briefed to the Louisiana Court of Appeal, First Circuit, who, on December 22, 2000, issued its opinion reversing the July 7, 1999 Judgment, holding Petitioner was

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[1] Petitioner has submitted the relevant decisions of the courts below in the Appendix to his Petition for Writ of Certiorari. Respondents adopt the Appendix submitted by Petitioner as the Joint Appendix in this matter, and have no need to submit any further Appdendix.

[2] Petitioner did not appeal the dismissal of the claims against CMGC.

not an employee covered under the LHWCA and that Petitioner's sole remedy is under Louisiana state law. Appendix "B", beginning at p. 8a. Following the decision of the Court of Appeal, Petitioner filed an Application for Rehearing. On March 6, 2001, the Court of Appeal granted rehearing for the limited purpose of providing more in-depth reasoning to clarify its opinion on the "maritime but local" doctrine, but in all other respects reaffirmed its December 22, 2000 opinion holding Petitioner was not a longshoreman and is limited to state law remedies. Appendix "A", beginning at p. 1a.

Thereafter Petitioner filed an Application for Writ of Certiorari or Review with the Louisiana Supreme Court, which was denied on May 25, 2001. Appendix "D", beginning at p. 35a.

REASONS FOR WRIT DENIAL

Direct Labor submits that the decisions of the courts below in this "maritime but local" matter are consistent with the Eleventh Circuit's decision in *Brockington v. Certified Electric*, 903 F.2d 1523 (11th Cir. 1990), and do not conflict with the United States Court of Appeal for the Fifth Circuit's decision in *Green v. Vermillion Corp.*, 144 F.3d 332 (5th Cir. 1998), *cert denied*, 526 U.S. 1017, 119 S.Ct. 1251, 143 L.Ed.2d 349 (1999) (hereinafter referred to as "*Green/Vermillion*"). Therefore Direct Labor respectfully requests the Petition for Writ of Certiorari be denied.

I. THE "MARITIME BUT LOCAL" DOCTRINE REQUIRES THE APPLICATION OF THE LOUISIANA WORKERS' COMPENSATION ACT IN THIS MATTER.

There is no real dispute that admiralty jurisdiction applies to the instant matter. The dispute is whether under the General Maritime Law an individual involved in non-maritime employment who is injured on navigable waters has a tort remedy against his employer for his co-employee's negligence, where there is a state compensation scheme that provides the employee's exclusive remedy is worker's compensation. Respondents contend the General Maritime Law does not afford a cause of action to an employee involved in a non-maritime employment against his employer for his co-employee's negligence.

This Court has on a number of occasions addressed the precise question presented herein, that is, the extent to which state law may provide a workers' compensation remedy in

the maritime context. One of the most succinct statements of the law in this area is found in *Director, Office of Workers' Compensation Programs, U.S. Department of Labor v. Perini North River Associates*, 459 U.S. 297, 103 S. Ct. 634, 74 L. Ed. 2d 465 (1983), wherein this Court held:

> If the employment of an injured worker was determined to have "no direct relation" to navigation or commerce, and the operation of local law [would not] materially "affect" the uniformity of maritime law, then the employment would be characterized as "maritime but local", and the state could provide a compensation remedy.

Id., 459 U.S. at 306, 103 S.Ct. at 641.

This Court has repeatedly held that oilfield workers who work on fixed platforms are not engaged in maritime employment. See, *e.g.*, *Herb's Welding, Inc. v. Gray*, 470 U.S. 414, 424-426, 105 S.Ct. 1421, 84 L.Ed.2d 406 (1985). Petitioner has essentially conceded that he was engaged in non-maritime employment. Therefore, his claim arising on navigable waters is "maritime but local". The Louisiana Supreme Court previously addressed the "maritime but local" doctrine in connection with claims by employees on fixed platforms where the claim arises on navigable waters:

> An offshore worker's employment activities have "no direct concern" with maritime shipping or commerce. The U.S. Supreme Court has stated that work related to oil and gas exploration is not "maritime employment." Therefore, the tangential relationship of offshore drilling to traditional mari-

> time activities along with the strong Louisiana interest in a case of this nature brings this case within the "maritime but local" doctrine.

Green v. Industrial Helicopters, Inc., 593 So.2d 634, 643 (La. 1992), *rehearing denied*, 593 So.2d 634 (La. 1992). (*citations omitted*) (hereinafter "*Green/Industrial*").

The Federal Fifth Circuit has also discussed the "maritime but local" doctrine in connection with workers' compensation claims:

> The Supreme Court next created the so-called maritime but local exception that allowed certain workers, injured on navigable waters to receive state workers' compensation benefits. "If the employment of an injured worker was determined to have no 'direct relation' to navigation or commerce, and the application of local law [would not] materially affect" the uniformity of maritime law, then the employment will be characterized as 'maritime but local', and the state could provide a compensation remedy. If the employment could not be characterized as "maritime but local" then the injured employee would be left without a compensation remedy.

Hetzel v. Bethlehem Steel Corporation, 50 F.3d 360, 364 (5th Cir. 1995) (*citations omitted*).

In the instant matter, the Louisiana Court of Appeal, First Circuit, concluded Petitioner's "employment was not itself particularly maritime in nature nor was its purpose to facili-

tate maritime commerce, as the work he performed involved working on an inland fixed oilfield platform. *See Rodrigue v. Aetna Casualty and Surety Co.*, 395 So.2d 352, 355, 89 S.Ct. 1835, 1837, 23 L. Ed. 2d 360 (1969)." Appendix "B", at p. 16a. Petitioner does not contest this finding, nor does Petitioner contest the Court of Appeal's finding on rehearing that Louisiana's "interest in applying its workers' compensation law far outweighed the federal interests found." Appendix "A", at p. 5a. Petitioner is a Louisiana citizen, Direct Labor was a Louisiana corporation, Petitioner's employment was totally within Louisiana and, Direct Labor contends, as noted in *Green/Industrial*, the parties herein "more likely than not, expect it to be governed by Louisiana law." *Green/Industrial*, 593 So.2d at 638. Therefore, just as in *Green/Industrial*, "Louisiana has a strong interest in applying its own law in this case," *Id.*, and Louisiana Workers' Compensation Act should provide Petitioner's remedy herein.

Direct Labor submits that given the strong Louisiana interest and the social policy embodied in the Louisiana Workers' Compensation Act, Louisiana law should be applied in this matter. Louisiana law should be respected unless there is some federal impediment to application of that law contained in federal legislation or a clearly applicable rule in the General Maritime Law. *Id.* As there is no federal legislation or applicable general maritime rule, there is no impediment to the application of Louisiana law.

Finally, as admiralty uniformity concerns generally involve legislation of maritime shipping and commerce, see *Id.*, at 641, and not "tort cases due to the fortuitous nature of

accidental injuries and the strong state interest in providing redress for injuries," *Rodrigue v. Legros*, 563 So.2d 248, 254 (La. 1990), application of Louisiana law in this matter does not adversely affect admiralty uniformity.

Direct Labor submits that the "maritime but local" doctrine repeatedly set forth by this Court governs the instant matter, as Petitioner's employment had no direct relation to navigation or commerce and the application of Louisiana law does not materially affect the uniformity of maritime law. Louisiana's interests far outweigh any federal interest in this matter. Petitioner herein was only fortuitously on navigable waters at the time of the incident. For these reasons Direct Labor submits the "maritime but local" doctrine requires the application of Louisiana law to Petitioner's claims in this matter.

II. PETITIONER IS NOT ENTITLED TO ASSERT A GENERAL MARITIME LAW CLAIM AGAINST HIS EMPLOYER.

This "maritime but local" matter is governed by Louisiana law and Petitioner's sole remedy against his employer Direct Labor is under the Louisiana Workers' Compensation Act. Petitioner is not entitled to assert a General Maritime Law negligence claim against his employer.

This matter is precisely on point with the Eleventh Circuit's decision in *Brockington v. Certified Electric*, 903 F.2d 1523 (11th Cir. 1990). In *Brockington*, the plaintiff, a land-based electrician, was riding in a vessel, not owned by his employer, but operated by his co-employee, *Id.* at 1525, when he was injured when the vessel crossed over the wake

of another vessel and he fell from his seat and was injured. *Id.* at 1526. *Brockington* filed suit against his employer under the LHWCA and the General Maritime Law. The Eleventh Circuit found that a land-based electrician was not engaged in maritime employment and thus could not satisfy both the situs and status requirements under the LHWCA. *Id.*, at 1528. The Eleventh Circuit went on to hold that although there was admiralty jurisdiction for the claim, the plaintiff could not assert a negligence claim against his employer in violation of the exclusivity provision of the Georgia Workers' Compensation Act. *Id.*, at 1533. The *Brockington* court reviewed the considerations in favor of application of state law, and found that the state has an "interest in being permitted to regulate independently matters of local concern without interference by the federal government, ...and in having state-created rights and obligations protected and enforced in actions in federal court." *Id.*, internal citations omitted. The *Brockington* court then reviewed a number of cases, some of which applied the federal rule, while others applied the state court rule, and ultimately concluded:

> Having considered the competing interest surrounding the present action, the court finds that the state has a strong interest in application of its worker's compensation law with no comparable interest to tip the balance in favor of application of General Maritime Law.

Id. at 1533.[3]

Respondents submit that Petitioner herein, like the plaintiff in *Brockington*, does not have a sufficient connection to maritime commerce to warrant application of maritime law in this "maritime but local" matter. Just as in *Brockington*, Petitioner was not involved in maritime employment at the time of his accident, was simply a passenger in a vessel owned by a party other than his employer, and was allegedly injured due to the negligence of a co-employee.

Petitioner argues incorrectly that this matter should be governed by *Green/Vermillion*. Direct Labor contends that not only did *Green/Vermillion* not create a broad new remedy available to this Petitioner, but also that it is clearly factually distinguishable from the instant matter.

Plaintiff's argument notwithstanding, *Green/Vermillion* did not create a broad new remedy, rather it created a very limited remedy for a non-fatally injured employee of a hunting club who was injured while unloading a vessel owned by the club. Even though the employee was engaged in a traditional maritime employment on navigable waters at the time he was injured, thus satisfying both the situs and status requirements for coverage under the LHWCA, 33 U.S.C. §901, *et seq.*, the Fifth Circuit held the employee was excluded from coverage under the club/camp exclusion to the

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[3] As stated above the Louisiana Supreme Court also held that Louisiana has a "strong" state interest in the area of oilfield activities which are non-maritime. *See Green/Industrial*, 593 So.2d at 643.

LHWCA, 33 U.S.C. §902(3)(B). *Green/Vermillion*, 144 F.3d at 335. The Fifth Circuit went on to hold that the employee, as a maritime worker not covered by the LHWCA, was entitled to assert an unseaworthiness claim and a General Maritime Law negligence claim against his employer. *Id.*, at 337; 341-2. Nowhere, however, in *Green/Vermillion* did the Fifth Circuit announce a broad, new remedy for all employees not covered by the LHWCA who are injured on navigable waters. *Green/Vermillion* is limited to employees engaged in maritime employment who are injured on navigable waters while performing traditional maritime work, thus satisfying both situs and status requirements, but who are not otherwise covered by the LHWCA by virtue of a specific exclusion in the act. Petitioner does not fit into this class of employees as he was not engaged in maritime employment at the time of the incident.

Further, the case before this Court is clearly factually distinguishable from *Green/Vermillion*. Unlike Green, Petitioner was not involved in traditional maritime employment and was not injured while onboard a vessel owned by his employer. The key facts upon which the Fifth Circuit relied to fashion a remedy in *Green/Vermillion* are simply not present in the instant case.

These same factual considerations distinguish the instant matter from *Spencer Kellogg & Sons, Inc. v. Hicks (The Lindseed King)*, 285 U.S. 502, 52 S.Ct. 450, 76 L. Ed. 903 (1932). In *The Lindseed King* the employer had the "dual relationship of a carrier by water and general employer," *Id.*, 285 U.S. at 514 52 S.Ct. at 454 and that was the basis for permitting an employee to maintain a tort action against his

employer. *The Lindseed King* employer was the owner of a 45' gasoline launch that was used on a daily basis to transport its employees across the Hudson River. *Id.* 285 U.S. at 505, 52 S.Ct. at 451. *The Lindseed King* employer owned a vessel that was involved in the interstate carriage of passengers, who were both employees and non-employees. *Id.* 285 U.S. at 508, 511, 52 S.Ct. at 451-52. This Court relied on three facts to permit the tort claim: that the employer was also the vessel owner; that the vessel was used daily to transport the employees to work; and that the vessel was being operated in interstate commerce. None of these factors are present in the instant case. The vessel was owned by CMGC, not Direct Labor. CMGC told the Direct Labor foreman which of CMGC's available vessels to use to transport the Direct Labor crew to the job site, Direct Labor did not use the vessel daily to transport its employees to work, interstate commerce was not implicated by transporting the crew from Bayou Black marina to Bayou Penchant and back. Thus, Direct Labor did not have the "dual relationship of a carrier by water and general employer" which would give rise to a tort claim by its employees.

Direct Labor contends that Petitioner's sole remedy against his employer is a claim under the Louisiana Workers' Compensation Act. None of the factual considerations which allowed a tort claim in *Green/Vermillion* or *The Lindseed King* are present in this case. Rather, this matter is factually identical to *Brockington*, where the non-maritime employee, who was injured while riding in a vessel not owned by his employer as a result of his co-employee's negligence, was limited to a workers' compensation claim.

CONCLUSION

Direct Labor submits that this matter is governed by the "maritime but local" doctrine. Petitioner was involved in non-maritime employment at the time he was injured while on navigable waters. His employment had no direct concern with maritime shipping or commerce and Louisiana has a strong public interest in having its workers' compensation law apply to claims such as this. Further, this matter is factually identical to *Brockington v. Certified Electric*, 903 F.2d 1523 (11th Cir. 1990) where the Eleventh Circuit held that an employee injured on navigable waters while riding in a vessel not owned by his employer could not sue his employer under the General Maritime Law, but was restricted to workers' compensation benefits. Finally, this matter is not governed by *Green v. Vermillion Corp.*, 144 F.3d 332 (5th Cir. 1998), *cert. denied*, 526 U.S. 1017, 119 S.Ct. 1251, 143 L. Ed. 2d 349 (1999) which provided a General Maritime Law remedy to a maritime employee who was precluded from coverage under the Longshore & Harbor Workers' Compensation Act by a specific exclusion in that act.

For these reasons Direct Labor, Inc. and The Gray Insurance Company respectfully request the Petition for Writ of Certiorari be denied.

Respectfully submitted.

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